U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 August 2005

CASE NO.: 2005-STA-00027

In the Matter of

CHARLES A. WILLIAMS, JR.
Complainant,

v.

CAPITOL ENTERTAINMENT SERVICES, INC.,
Respondent.

Appearances: Complainant Pro Se

John Best, President of Capitol Entertainment Services, Inc.
For Respondent

Before: Administrative Law Judge Janice K. Bullard

RECOMMENDED DECISION AND ORDER

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act" hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. The pertinent provisions of the Act prohibit the discharge, discipline, or discrimination of employees who refuse to operate a commercial motor vehicle when such operation constitutes a violation of federal motor vehicle safety regulations or because of reasonable apprehension of serious injury due to unsafe conditions or health matters.

This decision and order is also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

I. PROCEDURAL BACKGROUND

Charles Williams ("Complainant" hereinafter) was employed by Capitol Entertainment Services, Inc. ("Respondent" hereinafter) from approximately September 1, 2004 until he was terminated on or about September 27, 2004. On November 19, 2004, Complainant filed a complaint with the Department of Labor's Office of Occupational Safety and Health Administration ("OSHA" hereinafter) alleging that he had been discriminated against by Respondent for engaging in whistle blowing activities. After conducting an investigation, OSHA issued the findings of the Secretary on March 9, 2005, which concluded that Complainant's discharge was not related to protected activity.

On March 29, 2005, Complainant filed an appeal of that determination with the Office of Administrative Law Judges ("OALJ" hereinafter). The case was assigned to me for adjudication, and by Notice issued on April 1, 2005, I scheduled a hearing in the matter on Thursday, April 28, 2005 in New York, New York. At that time, the parties appeared and were given an opportunity to present evidence and arguments. Exhibits, as described herein, were admitted into the record. After the hearing, Complainant submitted rebuttal evidence and evidence regarding damages, and Respondent responded. At the hearing, Respondent was represented by counsel, Meisha A. Gravesande, whose services were thereafter terminated. John Best, Respondent's President, assumed representation of Respondent and submitted documents and argument on its behalf. Complainant also filed closing written argument. This decision is based upon all of the evidence and laws and regulations pertinent to the issues under adjudication.

II. ISSUES

1. Whether the parties are subject to the Act.

2. Whether Complainant engaged in activity that is protected within the meaning of the Act.

3. Whether Complainant's termination was due to his protected activity.

4. Whether sanctions are appropriate for Respondent's failure to respond to discovery requests.

III. CONTENTIONS OF THE PARTIES

Complainant contends that Respondent terminated his employment in retaliation for engaging in protected activity under the Act. Complainant alleges that he raised safety related issues directly with Mr. John Best, the President of Capitol Entertainment Services. Respondent denies that Complainant's termination was related to his protected activity, and further argues that Complainant's allegations of safety violations did not meet the standard for protected activity.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Documentary Evidence

Filings and Pleadings of the parties shall be referred to by description herein.

Complainant submitted Exhibits that I have marked CX 1 through CX 15 and admitted to the record. Tr. at 22-26.[1]

Post-hearing, Complainant submitted rebuttal evidence which I have identified as CX 16 and admitted to the record. Tr. at 316.

[1] "Tr." refers to hearing transcript of April 28, 2005.

Respondent submitted Exhibits that I have marked EX 1 through EX 17 and admitted to the record. Tr. at 28-48.

Complainant also submitted statements regarding compensatory damages, which I have identified as ALJX 3. Respondent's rebuttal to the compensatory damages claim has been identified as ALJX 4.

Complainant's discovery request was marked ALJX 1 and admitted to the record. An Affidavit of Service dated April 8, 2005 was marked ALJX 2 and admitted to the record.

B. Testimony

Charles Williams

Complainant testified that he was hired as Director of Maintenance for Capitol Entertainment Services ("Respondent" or "CES") to establish a preventative maintenance program for Respondent's buses. Tr. at 55. He started his employment on September 1, 2004. Tr. at 57. He has been a bus mechanic since 1986, and is a qualified inspector. Tr. at 56; 95-96; CX 6 and 7. When Complainant started his employment, Respondent had only one bus and a van, and in order to fulfill the obligations of a contract with the District of Columbia, Respondent leased buses from MCT Tours. Tr. at 57-58. From the start, Complainant observed that there were no "defect books" kept on Respondent's buses. Id. Complainant described a defect book as a daily record that bus drivers are required by the Federal Motor Carrier Safety Administration to maintain to record defects or maintenance issues. Tr. at 58-59. The buses owned by MCT tours did keep the required records. Tr. at 59.

Within a short time of beginning his employment, Complainant had secured books to be maintained by drivers, but he observed that the drivers were not correctly recording defects. Tr. at 61. Complainant was not responsible for supervising drivers, and he advised Respondent's owner, Mr. Best, of the problem. Mr. Best told Complainant that he "was coming on too strong" and suggested that he back off since the operation was just getting going. Tr. at 61. Complainant observed instances where defects were recorded by drivers, and he completed repairs. At other times, he observed defects that were not recorded. Tr. at 65-66. He saw no indication that the drivers kept better records during the course of his employment with Respondent, which lasted 27 days. Tr. at 70.

Complainant also advised Mr. Best that there were materials and equipment that he would need to best assure that mechanical repairs and maintenance were accomplished. Tr. at 62. The company didn't have the jacks necessary for replacing tires, and didn't keep a stock of oil or transmission fluid. Tr. at 63. The buses were kept at a lot owned by MCT, which had a shop area. Complainant was not aware of whether there was an arrangement between Respondent and any other company for maintenance of Respondent's buses. Tr. at 63-64.

Complainant testified that during his employment, Respondent bought buses from ABC bus company, which provided some kind of inspection, upon which Mr. Best relied. Tr. at 64-65. He did not believe that an additional inspection was undertaken by Respondent.

Complainant observed problems with vehicle maintenance, such as defective windshield wipers, low tread on tires, oil and antifreeze leaks, a faulty exhaust that cause emissions to spread to the passenger compartment, and he did not agree with how Mr. Best addressed the defects. Tr. at 70. Complainant testified that in one instance, he could not repair a battery housing because it needed welding, and as far as he knew, the temporary repair was never corrected. Tr. at 77. He proposed a schedule of preventative maintenance, but he wasn't employed long enough to effectuate it. Complainant recalled a particular instance where he pointed out a tire with low tread, and Mr. Best reacted in a threatening manner. Tr. at 73-74. Complainant also believed it would be a good idea to keep an inventory of tires on hand, and he secured information regarding the costs of tires. Id. at 75.

On Friday, September 24, 2005, Complainant advised Mrs. Best that one of the buses should be grounded because he believed the tires were bald. Mr. Best called him by telephone and directed him to measure the tread on the tires. He did so, and Mr. Best then told him to wait for a company to come to the lot to change the tires. Tr. at 82. The following Monday morning, he was fired. Tr. at 83. He remained on site because the owner of MCT Tours, Mrs. Thomas, hired him to help her with some repair work.

Complainant believes that his termination was directly related to his vocal concerns about safety issues. Tr. at 85. Complainant admitted that Mr. Best had initiated one discussion about his performance, but Complainant felt that Mr. Best's concerns were "misplaced". Id.

Complainant contacted the State of Maryland to inform them of irregularities involving the work site that he had observed during his employment with Respondent. Tr. at 92-85; CX 2-4.

Marie Saint Thomas

Ms. Thomas is the president of MCT Tours, which is located on the same site as Respondent's business. Tr. at 188. The two businesses have worked together for many years, subcontracting work to each other, sharing facilities and mechanics at time. Tr. at 188-190. Ms. Thomas knew Complainant from his employment with Respondent, and she observed him at work each day. Tr. at 190. She noticed that Complainant spent a lot of time using the company's computer, and further observed that he often was not on the premises. Id. She told Mr. Best that in her opinion, Complainant was not working to full capacity. Tr. at 191. Despite this, she and her husband decided to give Complainant a job when he was terminated because he was familiar with the needs of the company and its equipment, and MCT Tours' regular mechanic could only work a few hours a day because he was ill and worked for other companies as well. Tr. 191-192. Ms. Thomas was aware that an audit of her facility was pending, and that the presence of a mechanic is required during audits. Tr. at 204. Ms. Thomas testified that because she was on site daily, she believed that she could provide sufficient supervision to assure that Mr. Williams was performing his work assignments. Tr. at 192. In addition, she expected

Mr. Williams' tenure to be temporary, as he told her that he would be working for the State of Maryland. Id., and at 205.

Complainant worked for MCT Tours for about one month. Tr. at 210. Ms. Thomas terminated Complainant after he had used space on the company car lot for personal vehicles and for a tow truck without her authorization. Tr. at 193. Ms. Thomas stated that the tow truck owners had paid Mr. Williams $1,600.00 to store their truck at her facility without her permission, and she had to tell the owners that they needed to move the truck because she needed the space for her company's vehicle. Tr. at 193. Complainant did not provide any explanation for his conduct, and did not cooperate with Ms. Thomas' request that he remove the tow truck. Tr. at 194. In addition, Ms. Thomas did not believe that Complainant demonstrated any initiative while working for her. She explained:

> Well, as I stated earlier, and with this type of business there is always something to do, and that people tell him replace a bulb. He replaced that bulb and that is all he would do. He wouldn't check to see if the other bulbs had been burned or anything like that. He only just did that, and I couldn't afford to pay anybody that kind of money…I mean I provided what he needed to work.

Tr. at 194. She also found Complainant sleeping at the work site, and not available when she needed him. Tr. at 210-211.

Ms. Thomas testified that MCT Tours has six garage bays and stocks the necessary equipment for mechanics to perform their duties. Tr. at 195, 213. Ms. Thomas did not expect Complainant to do mechanical work involving heavy equipment. Tr. at 213. The drivers for MCT maintain defect logs and mileage logs as well as inspection reports. Tr. at 214. She also observed the times that drivers left from and returned to the facility. Tr. at 215.

Ms. Thomas described how she was subjected to an audit by the Department of Transportation because another company had used her company's identification number at a roadside inspection. Tr. at 195. The other company's vehicle was unmarked, and the driver did not have proper credentials to be driving. Tr. at 196. Her company's rating was downgraded to conditional during the investigation and her operations were suspended, but the Department of Transportation reinstated her satisfactory rating afterwards. Tr. at 197; EX 4, 5. All deficiencies noted in the investigation related to the unauthorized use of her company's DOT number on a bus driven by an individual who was not employed by MCT Tours. Tr. at 203-205.

Josh Best

Mr. Best has worked for Respondent as a bus driver for about 15 years. Tr. at 216. His duties include inspecting buses before they go out in the morning. Id. He arrives at the site at about 5:30 a.m. and checks the fluids, lights, signals, and other obvious operations of the buses. Tr. at 216-217. He also reviews drivers' reports to see if a specific defect or mechanical concern was noted from the previous trip. Id. Mr. Best saw Complainant on the first day the buses were dispatched to school at about ten minutes before 7:00 a.m. Mr. Williams told him that he would be doing the pre-trip inspection. Tr. at 218. Mr. Best recalled an incident where a wiper blade

needed replacement, and he told Mr. Williams about the problem. Tr. at 219. It was Mr. Best who eventually replaced the blade. Tr. at 224. He also replaced lights when necessary. Tr. at 229.

Lowell Bolden

Mr. Bolden has worked for Respondent for about three years. Tr. at 232. He had his own bus company for years but he ceased operations when insurance became too costly in late 2001. Tr. at 232. His job for CES is to work with the drivers, keep them on schedule, and drive himself when necessary. He works part-time. Id. He helps out with pre-trip inspections and helps get buses ready in the morning. Tr. at 234. Mr. Bolden was acquainted with Mr. Williams, and recalled asking him to change a windshield wiper, but said that he and Josh Best bought the part and changed it themselves. Tr. at 234-235. Mr. Bolden observed Mr. Williams at the work site, but was not aware of many repairs that he made. Tr. at 235-238. Mr. Bolden was familiar with the driver defect report, and uses it. Tr. at 242-243.

John Best

Mr. Best is the president of CES, which has been in business for twenty six (26) years. Tr. at 247. In March, 2004, his company bid on a contract to provide bus services for a school district, and he received word in late August that Respondent had been awarded the contract. Tr. at 248. The award was made days before performance was expected to begin, and Mr. Best immediately undertook to purchase buses from ABC bus company, which provides an inspection and certification for its vehicles. Id. Meanwhile, he arranged with other bus companies to subcontract their buses until his purchases could be delivered. Tr. at 249. He also needed a mechanic to fulfill the contract requirements, and a colleague recommended Complainant. Id. After interviewing Mr. Williams, Mr. Best hired him as a mechanic, but also anticipated that, in light of the expansion of his operations, Mr. Williams could devise a repair and maintenance system and a training schedule to assure compliance with government regulations. Tr. at 251. Mr. Best was excited by the possibilities that the contract provided his company and employees. Id.

Mr. Best testified that he wanted to avoid some problems with mechanics that he had observed over the years, including the habit of ordering new parts rather than trying to repair existing parts. Tr. at 254; EX 14. He made notes of the topics he wished to discuss during the interview including his expectation that his hire would attempt to repair deficiencies before resorting to replacing parts. Tr. at 255. Mr. Best also expected his new mechanic to work only on buses authorized by Respondent, and not do side jobs at the work site, and he made it clear that his salary covered all work that he was directed to perform. Id. He checked off the points he made as he made them during the interview. Id.

After he was hired, Mr. Best learned that Complainant did work for Ms. Thomas' company and charged her for it without clearing it with Mr. Best. Tr. at 256-257. Mr. Best did not reprimand Complainant, considering the newness of the relationship and instead generated a memorandum to formalize his policy. Id.; EX 12. Mr. Best also described how Complainant asked for a computer, a software program, and then investigated the company buying a lift and an inventory of tires. Tr. 259-260. Mr. Best bought the computer and a maintenance program,

but believed that the company did not have the resources or need for the other items. Tr. at 260. Mr. Best also became concerned that Complainant had arranged the delivery of a "Bobcat" which he had not authorized, and did not need. Id. Mr. Best observed that Complainant was often absent from the premises, and when there, did not appear to be doing much mechanical work. Id. Mr. Best decided he needed to speak with Complainant about his performance, which Mr. Best believed was poor. Tr. at 261. Mr. Best asked Mr. Williams to meet at Respondent's offices to discuss his performance. In addition, he became aware of some problems other people had experienced with Complainant. Tr. at 254-255.

Mr. Best recalled that Mr. Williams reported mechanical deficiencies that he agreed needed to be addressed, such as faulty brake lights and faulty brakes. Tr. at 268. When Complainant told him that he needed driver's defect books, he ordered them. Tr. at 269. Mr. Best testified that he needed to account for every dollar that the company spent, and that he would not give Complainant a repair maintenance budget. Tr. at 269. Respondent subleases the facility from Ms. Thomas, and has the use of her company's equipment. Tr. at 270. The companies share buses. Id. Mr. Best denied that he did not have necessary equipment because he could use Ms. Thomas' equipment, or send his buses to other companies for work that his mechanics could not perform. Tr. at 275; 296. Mr. Best did not consider a lift necessary because one could easily move under a bus with only a ramp. Tr. at 296. Mr. Best was aware that drivers did not always keep reports properly, but believed that as time went on that problem was corrected. Id.

According to Mr. Best, the schedule that the buses ran would have allowed from 9:30 to 2:30 or so for Complainant to effect repairs. Tr. at 276. He admitted that Complainant had performed at least one major repair on an exhaust system. Tr. at 292. Mr. Best also recalled that Mr. Williams had advised him that tires were bald. Mr. Best remembered his reaction to that conversation: "And I said bald tires because that struck me right in my heart. Why am I--I have an account with McCarthy Tire. Why am I running with bald tires?". Tr. at 292. Mr. Best acknowledged this was a safety issue. Tr. at 293. He immediately looked at his buses to inspect the tires. Tr. at 294. Although Mr. Best did not see an obvious defect, he contacted his tire contractor to service the tires.

Respondent's offices are not physically located at the site where Complainant worked, but Mr. Best communicated with Mr. Williams by telephone, and he stopped by the shop frequently. Tr. at 258. Mr. Best provided Complainant with a mobile phone to use to contact him and conduct business. He also provided him an apartment, with rent deferred as a loan. Tr. at 262. The apartment was owned by Mr. Best's daughter and son-in-law. Tr. at 263. Mr. Best also gave Complainant some money to rent a truck and move his tools. Id. Mr. Best at times gave Mr. Williams cash because he was aware that "he was low on funds". Tr. at 263. Mr. Best denied that he wanted Mr. Williams to be a resident of the District of Columbia to fulfill contract requirements, and stated that he had adequate employees in the District to meet that expectation. Tr. at 283-285.

Mr. Best concluded that Complainant would not improve his performance. Mr. Best "just thought for some reason Mr. Williams didn't want to produce. He would get in his car and leave. I just thought he wanted to be a safety officer. He wanted to be a big supervisor…" Tr.

at 300. Mr. Best was surprised that Ms. Thomas hired Complainant, and he told her so, though he understood her position with the impending audit. Tr. at 302.

C. Statement of the Law

49 U.S.C.A. § 31105(a)(1) ("the Act"), provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A). Internal complaints to management are protected under the STAA. *Reed v. National Minerals Corp.*, Case No. 91-STA-34, Sec., Dec. and Order, slip op. at 4, July 24, 1992. A "commercial motor vehicle" includes "any self-propelled…vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C. app. § 2301(1).

The Act further provides protection for employees who have "a reasonable apprehension of serious injury to [themselves] or the public due to [an] unsafe condition." § 31105(a)(1)(B)(ii). Whether an employee's apprehension of serious injury is reasonable is subject to an inquiry of whether a reasonable individual in the same circumstances would conclude that the condition represents a real danger of accident, injury, or impairment to health. Id. To prevail under the STAA, a complainant must prove that he engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young's Commercial Transfer, Inc.,* ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sac's v. Minnesota Corn Processors, Inc.,* ABR No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003). By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Once the inference is established, the respondent has the opportunity to present evidence of a nondiscriminatory justification for the adverse employment action. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992). The respondent need only articulate a legitimate reason for its action. *St. Mary's Honor Center v. Hicks*, 509 I.S. 502 (1993). If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. *Moon v. Transport Drivers, Inc.*, 836 F. 2d 226 (6th Cir. 1987); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id.

When an employer offers a nondiscriminatory justification for the adverse employment action, then it is necessary to decide whether that reason is pretexual. Instead of focusing on whether a prima facie case has been made out in this circumstance, "the proper inquiry is

whether the complainant has shown that the reason for the adverse action was his protected safety complaints." *Pike v. Public Storage Companies Inc*., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.,* ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

D. Discussion

1. Whether the parties are subject to the Act.

Employer is an entity that operates vehicles with a gross weight rating in excess of 10,000 pounds and is engaged in interstate commerce. As a mechanic, Complainant was employed in a position that directly affects the safety of such vehicles. Neither party objected to the application of the Act. Accordingly, I find that the parties are subject to the Act.

2. Whether Complainant engaged in activity that is protected within the meaning of the Act.

To establish protected activity, Complainant need show only that he reasonably perceived a violation of the Act or regulations pertaining thereto. Complainant need not prove an actual safety violation, but must establish that his complaints were made in good faith. *Ashcraft v. University of Cincinnati*, ALJ No. 83-ERA-7 (July 1, 1983). Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of discrimination. *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec'y Oct. 10, 1991). Moreover, since this case was fully tried on its merits, it is not necessary to determine whether Complainant presented a *prima facie* case and whether Respondent rebutted the showing. *U.S.P.S. Bd. of Governors v. Aikens,* 460 U.S. 711, 713-14 (1983); *Roadway Express,* 929 F.2d at 1063. Once the respondent has produced evidence in an attempt to show that the complainant was subjected to adverse action for a legitimate reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case. *Ciotti v. Sysco Foods of Philadelphia,* 97-STA-30 at 5 (ARB July 8, 2003). Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability.

Despite this analytical model, I find it appropriate to address whether Complainant engaged in protected activity. The evidence demonstrates that the concerns he raised about adequate equipment and inventory of parts do not directly impact safety, as Respondent makes arrangements with other service providers to make repairs outside of the ability of its shop. I therefore find that by raising these issues with Respondent, Complainant did not engage in protected activity under the Act.

The evidence clearly establishes that Complainant refused to clear vehicles for service because of concerns that he had about the safety of buses used to transport children to school. Respondent posits that even if these allegations involved safety concerns, they did not constitute

protected activity because they involved the conduct of his supervisor, and involved the performance of his own job duties. In making this argument, Respondent erroneously relies upon the interpretation and application of the Whistleblower Protection Act of 1989, § 1 et seq., 103 Stat. 16, codified at 5 U.S.C. § 2302 et seq., which applies to certain employees of the United States who make non-trivial disclosures that are protected under that statute. The instant matter involves a claim for protection under the whistleblower provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act"), and implementing regulations set forth at 29 C.F.R. part 1978. The legal standard that applies to the Act is different from the standard that applies to the Whistleblower Protection Act. I find that Complainant's concerns about the safety of tires and an exhaust system were based upon a reasonable apprehension of serious injury to the public due to potentially unsafe conditions, and are protected activity under the Act. See, § 31105(a)(1)(B)(ii).

It is uncontroverted that Complainant was terminated from his employment with Respondent on September 27, 2004, and consequently suffered an adverse employment action. In addition, the record demonstrates that just days before his discharge, Complainant had raised concerns about the safety of a bus that he grounded, which I find constitutes protected activity. I find that the temporal connection between the protected activity and the adverse action is sufficient to meet Complainant's burden of establishing a *prima facie* case of discrimination.

3. Whether Complainant's termination was related to his protected activity.

Although I have concluded that Complainant's concerns about safety issues were reasonable, and that he has demonstrated a *prima facie* case, I find that Respondent has demonstrated that Complainant was terminated for an unrelated legitimate reason. I further find that Complainant provided no evidence that Respondent's rationale for his termination is mere pretext. It is clear from the testimony of the parties that Mr. Williams did not meet Mr. Best's expectations of job performance. It is equally clear that the job itself fell short of Complainant's expectations. Complainant assumed a position that was in flux and not well defined, and it is clear that he was frustrated and disappointed to find circumstances that did not fit his vision of supervising the maintenance of Respondent's business. However, Complainant's efforts were not best suited to the beginning days of the expansion of Respondent's business, when it was clearly Respondent's priority to acquire sufficient vehicles to meet its contractual needs, and to utilize Complainant's mechanical skills to keep the fleet in service. The contradictory needs of the parties led to a perhaps predictably sour relationship, where Respondent felt that Complainant was not performing the work it expected, and Complainant believed that Respondent did not provide the resources he needed to make his vision of the job a success.

Complainant's efforts on the job were directed to improving the physical site and the policies and procedures of the business, and not the mechanical defects of buses. The record also reflects distinct instances where Complainant's work performance fell short of expectations. He showed no initiative in replacing a wiper blade, and a bus was out of commission for days until another employee fixed the problem. Complainant testified that he did not know how the blade was replaced, an admission that shows a somewhat casual attitude from an employee whose primary duties were those of a bus mechanic. Although Complainant asserted that he did not have proper equipment on site to do some repairs that languished for days, the record is clear that

Mr. Best had agreements with sub contractors that he would have authorized Complainant to use, had Complainant informed him of the need. Mr. Best was not physically on site at all times, and relied upon Complainant to keep him informed of the mechanical needs of the bus fleet.

In addition to performance shortfalls, the record reflects that Complainant's conduct while employed by Respondent was unacceptable at times. Corroborative testimony described Complainant's unauthorized use of the work site for personal reasons and his frequent absences during official duty hours. Complainant offered no rebuttal to these accusations by Respondent and his subsequent employer, Ms. Thomas.

In consideration of the record as a whole, I find that Respondent had a legitimate reason to terminate Complainant. Despite the temporal relationship between one incident of protected activity, that is, Complainant's expression of concern about tire tread, and his termination, I find no evidence that this activity contributed in any way to his termination. I am persuaded by Mr. John Best's credible testimony regarding his concern about possible defects in tires, which could readily be addressed by his contract with a tire company, and which indeed were. The evidence is uncontradicted that Mr. Best immediately addressed situations that potentially impacted safety concerns when he learned of them. When Complainant advised Mr. Best that the company needed its drivers to use a defect record book, Mr. Best ordered them. When Complainant recommended that a bus be "grounded" for a mechanical defect, Mr. Best complied. I find that Respondent has shown by clear and convincing evidence that the adverse action against Complainant was not pretexual.

In reaching my conclusions, I have given little weight to the evidence regarding Complainant's criminal history. I also accord little weight to the hearsay evidence regarding Complainant's out of work conduct towards other people, about which Mr. Best expressed apprehension. I find that Complainant's demeanor supports his credibility, and further find that Complainant is sincere in his belief that he was focused on the safety of Respondent's buses. Nevertheless, I find that Respondent was equally sincere in attempting to address safety issues, and that Complainant's reports of safety conditions did not factor into Respondent's decision to terminate Mr. Williams' employment. I find no evidence of personal gain to Mr. Best for extending loans and advancing rent to Mr. Williams.

Because I have found that there is no nexus between Complainant's protected activity and the adverse employment action he suffered, I need not discuss the evidence he submitted regarding compensatory damages.

4. Whether sanctions are appropriate for Respondent's failure to respond to discovery requests.

Complainant produced evidence that he had served Respondent with a request for production of documents at his business address through the use of a process server. ALJX 1. A copy of the affidavit of service certified by a deputy clerk for the Superior Court of the District of Columbia is of record. ALJX 2. Because of Complainant's status as a *pro se* litigant, I have overlooked the procedural defect of using another forum's form of service in this federal administrative proceeding, and have admitted these documents into the record. However, I place

little weight on the affidavit of service in light of Mr. Best's credible testimony that he had not been personally served with the request, nor had anyone at his business. Since the affidavit of both the process server and Mr. Best were made under oath, I have chosen to accord more weight to Mr. Best's testimony because it is rational and supported by the record. There would be no benefit accruing to Mr. Best to deny receipt of the service, nor to ignore the requests. I am persuaded that Mr. Best would not have ignored a legal document served personally by a process server because of his personal knowledge of the legal system, accrued through his service as a probation/parole officer.

Further, I find that, though late received, Respondent made the documents available to the Complainant to the extent that they existed. As I kept the record open following the hearing for the submission of argument and additional evidence, I find that there was no prejudice to Complainant in the failure of Respondent to timely respond to a request for production of documents. I note that although Respondent was represented at the hearing by an attorney, the attorney's participation was limited only to the formal hearing, and Respondent acted on its behalf both before and after that event.

V. CONCLUSION

Because Complainant has not demonstrated a link between any protected activity and an adverse employment action that the Respondent took, I find that Complainant is not entitled to the relief he seeks under the Act.

RECOMMENDED ORDER

It is hereby recommended that Complainant CHARLES A. WILLIAMS, Case No. 2005-STA-00027 be DISMISSED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).